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# In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216

THEODORE RISTAINO ET AL.,
PETITIONERS,

*v.*

JAMES ROSS, JR.,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

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### Opinions Below.

The opinion of the court below (App. A) is not yet reported. The memorandum and order of the District Court (App. B) is not reported. The opinion of the Massachusetts Supreme Judicial Court (App. C) is reported at Mass. Adv. Sh. (1973) 839, 296 N.E. 2d 810.

## Jurisdiction.

The judgment of the court below was entered on December 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Questions Presented.

I. Whether the decision of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), is to be accorded retrospective effect upon a conviction which had become final prior to that decision and is now attacked collaterally upon a petition for writ of habeas corpus?

II. Whether the First Circuit Court of Appeals erred in extending the decision of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), to a new and different factual situation?

III. Whether a failure to comply with the requirements of *Ham* v. *South Carolina*, 409 U.S. 524 (1973), constitutes error of constitutional dimensions requiring reversal of conviction in all instances?

## Constitutional Provision Involved.

AMENDMENT XIV.

§ 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



## Statement of the Case.

On June 17, 1970, the respondent was brought to trial in Middlesex County Superior Court before a judge and jury on three indictments charging armed robbery (indictment No. 48032), assault and battery by means of a dangerous weapon (indictment No. 48112), and assault and battery with intent to murder (indictment No. 48033). On July 2, 1970, a verdict of guilty on each indictment was returned and the respondent was sentenced to the Massachusetts Correctional Institution, Walpole, for concurrent terms of 18-30 years for armed robbery, 6-10 years for assault with a dangerous weapon, and 18-20 years for assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions. *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1972) 873, 282 N.E. 2d 70 (App. D).

The respondent then applied for a writ of certiorari to the United States Supreme Court on the issue of the scope of the voir dire examination of prospective jurors. On January 22, 1973, this Court granted certiorari, vacated the judgment, and remanded the case to the Massachusetts Supreme Judicial Court for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

On remand the Supreme Judicial Court addressed the following issue:

" . . . whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced." *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1973) 839 (App. C),

and concluded:

"We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias." *Commonwealth* v. *Ross*, *supra*, at 845 (App. C).

The respondent filed a second petition for certiorari with the United States Supreme Court on the same issue as that raised by his previous application. On December 3, 1973, the petition was denied. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1970); Justice Marshall filed an opinion dissenting from the denial in which Justices Douglas and Brennan joined.

The respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. On June 15, 1974, the United States District Court granted the writ, stating:

"The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors." (Memorandum and Order, App. B).



The respondents therein filed notice of appeal in the United States Court of Appeals for the First Circuit. On December 31, 1974, the Court of Appeals for the First Circuit, by a two-to-one decision, ordered:

"The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied." (App. A, Opinion, p. 6.)

**Introduction.**

The petitioners argue the following reasons why this petition for a writ of certiorari should be granted:

1. This Court has not had the opportunity to rule on whether retroactive or prospective effect is to be accorded *Ham* v. *South Carolina*;

2. The impact of the decision of the court below is substantial and detrimental to the administration of justice in this jurisdiction;

3. A conflict exists among the federal Circuit Courts of Appeal and most particularly between the First Circuit Court of Appeals and the Supreme Judicial Court of Massachusetts as to the proper interpretation of *Ham* v. *South Carolina*, *supra*;

4. The court below has erroneously extended the decision of this court in *Ham* v. *South Carolina*, *supra*, to a new and different factual situation.

The petitioner respectfully submits that the proper development of law requires that the questions posed on this petition be answered.

## Argument.

### I. The First Circuit Court of Appeals Erred in Giving *Ham* v. *South Carolina*, 409 U.S. 524 (1973), Retroactive Effect.

The First Circuit Court of Appeals stated:

> "The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts, and remanded that case to that court for reconsideration in light of *Ham*. . . ."

The First Circuit thereby inferred that this Court had ruled that *Ham* was to be given retroactive effect. The petitioner submits that there is no support for such an inference. Nothing in this Court's consideration of *Ham* or *Ross* indicated a decision by this Court on the merits of the question of retroactivity.[1]

[1] The petitioners submit that if an inference were to be drawn from this Court's judgment in *Ross*, *supra*, it is that, had this Court pronounced a new constitutional mandate to be applied retroactively, *Ross* would have been reversed outright. Vacation of judgment and remand for reconsideration suggests that *Ham* indeed was limited to its facts.



The rule enunciated in *Ham* should not be given retroactive effect. On January 21, 1975, this Court ruled in *Taylor* v. *Louisiana*, U.S. , 43 L.W. 4167, that the Louisiana jury selection system, whose operation resulted in very few women being called for jury service, violated a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. The defendant's conviction was reversed. On January 27, 1975, this Court considered on appeal the case of *Daniel* v. *Louisiana*, U.S. (Slip Opinion dated January 27, 1975), raising the same issue as decided by the Court in *Taylor*, *supra*. The Court held, " . . . *Taylor* is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empanelled prior to the date of that decision."

That *Taylor* involved the Sixth as well as the Fourteenth Amendment does not present a substantial basis for differentiating in the effect to be accorded *Taylor* and *Ham*. Both cases address the issue of a defendant's right to be tried by an impartial jury; the purpose or function of the rule enunciated in each case is to prevent arbitrary and repressive action, and to guarantee to a defendant the type of fact finder to which he is constitutionally entitled.

This Court based its decision in *Daniel*, *supra*, on *DeStefano* v. *Woods*, 392 U.S. 631 (1968), holding *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), to be applicable only prospectively. In both instances this Court considered as factors affecting the judgment whether a case substantially revising prior doctrines should be applied only prospectively: (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. See *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

The petitioners submit that the considerations which operated to require prospective application in the above cases are

present in the instant case. As in *Taylor* and *Duncan*, the rule of *Ham* is directed toward the function of the jury in the criminal justice system; to ensure impartiality and prevent arbitrariness and repression. With the exception of *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931), in which the Supreme Court, in an exercise of its supervisory powers, held that the exercise of discretion vested in the trial judge as to the questions to be put on voir dire is "subject to the essential demands of fairness," there has been no enunciation of a constitutional requirement that questions specifically addressed to the issue of racial bias must be asked on voir dire. Indeed, the courts of the Commonwealth have uniformly applied a rule directly contrary to the *Ham* case. See, *e.g.*, *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718 (1949).

There was, therefore, prior to *Ham*, no basis upon which a trial judge in this Commonwealth, or in other jurisdictions, could foresee a specific constitutional rule requiring that questions directed toward the specific question of racial prejudice be put to prospective jurors in every instance.

As in *Duncan* v. *Taylor*, to hold that *Ham* be given retroactive application would result in the retrial of a significant number of persons and would have a substantial impact on the administration of criminal justice in Massachusetts and in other jurisdictions whose procedures on voir dire examination did not comport with the specific directives of *Ham*.[1]

[1] At present the following cases are pending on petitions for writs of habeas corpus in the Federal District Court for the District of Massachusetts. All involve the same issue: *Ryles* v. *Ristaino*, Civil Action No. 74-15-S; *Dukes* v. *Waitkevitch*, Civil Action No. 74-4376-T; *Bumpus* v. *Waitkevitch et al*; Civil Action No. 74-5197-G, stayed 1/9/75 in accord with *Ross*; *Williams* v. *Vinzant*, Civil Action No. 74-2640; *Daniel* v. *Vinzant*, Civil Action No. 74-2641-S. The case of *Commonwealth* v. *Lumley*, Supreme Judicial Court No. 30, is presently awaiting decision in the Supreme Judicial Court of Massachusetts.



In addition to the three-prong test considered above, the petitioners suggest that where, as here, the judgment of a state court has become final before a new procedural rule has been promulgated, principles of comity and federalism must be considered in determining retroactivity as to cases collaterally attacking a judgment upon a petition for writ of habeas corpus.

> " . . . given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated." *Desist* v. *United States*, 394 U.S. 244, 267 (1969) (Justice Harlan dissenting).

The petitioners submit, therefore, that if the failure of a trial judge to ask questions designed specifically to focus the attention of prospective jurors on racial prejudice is "as a matter of constitutional law" reversible error, "in fairness to trial judges, state and federal, the rule should only be so promulgated for future cases." *Ristaino* v. *Ross*, *supra*, p. 9 (Justice Moore dissenting).

Moreover, under Massachusetts procedure, a defendant may raise, by writ of error, questions whose constitutional significance was not established until after trial. *LeBlanc* v. *Commonwealth*, Mass. Adv. Sh. (1973) 325. Therefore, the retroactive application of the *Ham* case would require reversal of every case in the Commonwealth involving a defendant who was a member of a racial minority.

## II. The First Circuit Court of Appeals has Erroneously Extended the Decision of this Court in Ham v. South Carolina, 409 U.S. 524 (1973), to Encompass a New and Different Factual Situation.

In *Ham*, *supra*, at 527, Mr. Justice Rehnquist stated:

> " . . . we think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (Emphasis supplied.)

### A. *There is a Conflict Among the Federal Circuits as to the Proper Interpretation of the Above-Cited Language.*

Five Circuit Courts of Appeal have treated *Ham* as enunciating a new constitutional requirement.[3] Each of these cases

[3] *United States* v. *Robinson*, 485 F. 2d 1157 (3d Cir. 1973); *Featherston* v. *United States*, 491 F. 2d 96 (5th Cir. 1974); *United States* v. *Ross*, 477 F. 2d 551 (6th Cir. 1973); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); *United States* v. *Robinson*, 475 F. 2d 376 (D.C. Cir. 1973) ("In *Ham* v. *South Carolina* [citation omitted] the Supreme Court recently noted the special constitutional status of *voir dire* questions designed to ferret out racial bias." At 381, fn. 8.).



dealt with a federal prosecution in the federal courts. Therefore, the supervisory requirement of *Aldridge* v. *United States*, 283 U.S. 308 (1931), as well as the requirements of the Due Process Clause of the Fourteenth Amendment, as enunciated by *Ham*, were considered.

> "Any doubts as to the mandatory requirements of the *Aldridge* rule were dispelled by the case of *Ham* v. *South Carolina* [citation omitted]. . . . The Supreme Court emphasized that the right to have the judge make inquiry on voir dire as to racial prejudice was one of constitutional dimensions." *United States* v. *Robinson*, 485 F. 2d 1157, 1159 (3d Cir. 1973).

The Ninth Circuit, however, limits *Ham* to its facts. Discussing the limited application of *Ham* and *Aldridge* to special circumstances, the Ninth Circuit stated:

> "*Aldridge* and *Ham* are distinguishable. In *Aldridge* a black man was charged with the murder of a white policeman. All the jurors were white. Recognizing that the trial court has 'a broad discretion as to the questions to be asked', the Court held that the exercise of this discretion is 'subject to the essential demands of fairness' and that under the circumstances of that case the court erred in failing to permit counsel to ask questions relative to 'racial prejudice.' 283 U.S. at 310-311, 51 S. Ct. at 471. *Ham* involved the prosecution of a black civil rights leader for possession of drugs. 'His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.' 409 U.S. at 525, 93 S. Ct. at 849. Following *Aldridge* the Court again recognized 'the tradition-

ally broad discretion accorded to the trial judge in conducting *voir dire*', 409 U.S. at 528, 93 S. Ct. at 851, but held that *under the facts shown by the record* the jurors should have been interrogated on 'the issue of racial bias.' *id.* at 527, 93 S. Ct. 848." (Emphasis supplied.) *United States* v. *Walker*, 491 F. 2d 236, 239 (9th Cir. 1974).

The Second Circuit has avoided resolution of the issue by holding that failure to ask a question directed to racial bias was, if error, harmless beyond a reasonable doubt in view of overwhelming evidence. *United States* v. *Grant*, 494 F. 2d (2d Cir. 1974).

The Seventh Circuit in *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973), addressed the issue in a federal prosecution and held that *Aldridge, supra,* was controlling. However, the court did state:

"For that reason reversal need not rest on a constitutional ground. It is nevertheless significant that a unanimous Supreme Court recently reversed a state judgment because the trial judge refused to ask prospective jurors about possible prejudice against black people. [Citation omitted.] There was perhaps a greater risk of prejudice against Ham because of his participation in civil rights activities than against the appellant in this case, but the Court's appraisal of the error as violative of the 'essential demands of fairness' protected by the Due Process Clause, 409 U.S. at 526 . . . persuades us that on direct review of a federal conviction we should reverse without attempting to appraise the actual likelihood of prejudice to this appellant." *United States* v. *Booker*, at 1311.



Therefore, petitioners submit there is conflict and uncertainty among the federal circuits as to the application and effect of the *Ham* decision.

Although the instant case is the only case in which a federal court of appeals has ruled on the application of *Ham* to a state court proceeding, it is fair to say that the issue will be raised in a substantial number of cases, not only in District Court of the District of Massachusetts[4], but in other jurisdictions which have taken a position similar to that of the Supreme Judicial Court of Massachusetts.[5]

Moreover, the decision of the First Circuit does not effectively resolve the question of the proper interpretation of *Ham*. The First Circuit, while on one hand conceding that the *Ham* opinion "did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on voir dire the trial judge must do so" (App. A., ), interprets and, we suggest, extends the *Ham* decision to require reversal of every case in which the "charges against the defendant involved violence against a white" and the trial judge declined to address specific questions directed to the issue of racial prejudice to the prospective jurors. Thus, the Court of Appeals has, in effect, ruled that *Ham* is not limited to the facts of that case, *i.e.*, where the defendant, a well-known civil rights worker, whose "defense at the trial was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge" (*Ham*, *supra*, at 525), but does enunciate a broad new constitutional requirement. The petitioners submit that such an interpretation is erroneous.

[4] See footnote 2, cases presently pending in the Federal District Court.

[5] Cf. *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A. 2d 281 (1974) (conviction of forcible rape affirmed by 3 to 2 vote; requested racial questioning; held irrelevant and overbroad.)

### *B. The Ham Decision is Limited to Special Circumstances Involving Racial Prejudice.*

The petitioners submit that this Court in *Ham* quite precisely limited its decision to the "facts shown on this record."[6] The Supreme Judicial Court in *Ross* v. *Commonwealth*, *supra*, properly reconsidered the factual situation in *Ross* and determined that, as opposed to *Ham*, nothing pointed to *Ross* as a special target for racial prejudice.[7]

> "We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the States to ensure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions designed to discover racial prejudice of the veniremen did not, in this case, violate the defendant's right to the demands of fairness." Mass. Adv. Sh. (1973) at 846. (App. C.)

[6] The petitioners submit that the language in the opinion does not reflect mere "common judicial locutions" but means what it says.

[7] In fact the record reflects that the trial judge, in lobby conference, inquired of the defense attorneys whether there was something peculiar to the case or circumstances which they would like to put on the record. An attorney for a codefendant replied, "No, just the fact that the victim is white and the defendants are black" (App. C). The attorney for *Ross* did not bring any other special circumstances to the trial judge's attention.



### *C. If Ham is Considered as Limited to its Facts, the First Circuit Court of Appeals Erred in Granting Habeas Corpus Relief.*

The scope of voir dire is within the discretion of the trial judge. "In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). The discretion of the trial judge in Massachusetts is limited both by Mass. Gen. Laws, c. 234, § 28, requiring examination of four areas of potential prejudice upon motion of either party,[8] and by the "essential demands of fairness" required by the Due Process Clause of the United States Constitution. The decision of the trial judge should not be set aside by a reviewing court in a collateral proceeding absent a showing of manifest error. *Reynolds* v. *United States*, 98 U.S. 145 (1878) (quoted with approval in *Irvin* v. *Dowd*, 366 U.S. 717 (1961)). *Ham*, *supra*, left unaltered the manifest error standard of *Reynolds*. Therefore, the petitioner in the court below had the burden of proving manifest error and, we submit, failed to sustain that burden.

[8] There is no question that the trial judge fully explored these areas. In fact, the Federal District Court in granting the writ stated:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." (App. B).

## III. An Error with Respect to the Procedure Employed upon Voir Dire Questioning does Not, as a Matter of Constitutional Law, Necessarily Require Reversal.

The trial judge in the instant case asked all prospective jurors the statutory questions required under Mass. Gen. Laws, c. 234, § 28.

Within this Commonwealth, it has been held historically that it is within the discretion of the trial judge whether or not to broaden the scope of the voir dire. *Commonwealth* v. *Gee*, 6 Cush. 174 (1850); *Commonwealth* v. *Geagan*, 339 Mass. 487 (1959), cert. denied sub nom. *Geagan* v. *Massachusetts*, 361 U.S. 895 (1959).

In addition to posing the statutory questions to the venire the trial judge repeatedly directed the jury and the venire to the question of their sensitivity to any bias or prejudice.

> "Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (Tr. 494.)

During the voir dire, every pool of prospective jurors was similarly instructed. All veniremen were instructed to raise their hands to bring to the attention of the court all questions of conscience. Two jurors were dismissed for cause when, upon questioning, the court determined they were unable to return a fair and impartial verdict because of racial prejudice (Tr. 440-441, 464).

These instructions and questions insured that, as far as is possible, an impartial jury satisfying the "essential demands of fairness" was impaneled. The opinion of the Supreme Judicial



Court in *Commonwealth* v. *Ross*, *supra*, 842-845, details the extent to which the trial judge endeavored to secure an impartial jury.

> "Although the judge declined to ask the veniremen whether they were prejudiced against black people, he decided, 'in the interest of good sense,' not to mention the defendants' Muslim names appearing on the indictments, but only to refer to them as Ross, Daniels and Williams. The judge carefully weighed the likelihood of discovering bias by means of questions concerning race prejudice and came to the conclusion that it would be most unusual for such questions to reveal any such prejudice. He explained to the veniremen with clarity that they must let the court know if for any reason they could not try the case impartially, without bias or prejudice or if they had already formed an opinion. He pointed out that 'your oath requires . . . that any verdict that you return must be a fair and impartial verdict based upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion or any other experience factor.' The veniremen were told that they must raise their hands '[i]f, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict.'
>
> "It is clear that at least one of the prospective jurors understood that the questions put to him about his prejudice or bias included race prejudice. The defendants were asked to stand up so that the veniremen could see them. The clerk then asked the veniremen the questions outlined by the judge and various other questions previously explained to them but not in dispute here. In answer to the clerk's questions, several prospective jurors raised their

hands to indicate possible bias. Those who indicated that they might be biased, prejudiced or had already formed an opinion of the defendants' guilt were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice. Seven prospective jurors were excused because they had already formed an opinion, seven were excused because of connections with police work, and one was excused because of his affiliation with the university where the alleged crimes occurred. The final composition of the jury of twelve was ten white persons and two black persons." (Footnotes omitted.)

The federal District Court concurred with the Supreme Judicial Court in finding that the trial court conducted the voir dire in a careful and conscientious manner:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." (Memorandum and Order, App. p. 17.)

The First Circuit Court of Appeals concurred with this characterization of the trial court's efforts, but held that failure to specifically address a question designed to elicit racial prejudice required that the writ of habeas corpus issue.

The petitioners submit that the failure to ask the specific questions under the circumstances of the instant case does not



constitute an error of constitutional dimension. In order to demonstrate a denial of fundamental fairness, the unfairness complained of must be of such degree as necessarily prevents a fair trial. *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). However, under the circumstances of this case, it is sheer speculation to conclude that the attention of the jurors was not focused on the racial overtones of the case, especially in view of the fact that at least one prospective juror was excluded because of admitted racial prejudice. Mere speculation as to the possibility of unfairness does not constitute error of constitutional dimension.

> " . . . the burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).
>
> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910).

The petitioners submit that on a collateral attack upon a final state court judgment a federal court may interfere only where the alleged error is so conspicuous and substantial as to result in a constitutionally unfair trial.

> "It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted." *Chavez* v. *Dickson*, 280 F. 2d

727, 735 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

Therefore, where the trial judge's conduct on voir dire is exemplary and complies with the essential demands of fairness, reversal by the federal court is unwarranted.

## Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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Appendix A.

# United States Court of Appeals
## For the First Circuit

No. 74-1222

THEODORE RISTAINO ET AL.,

RESPONDENTS, APPELLANTS,

*v.*

JAMES ROSS, JR.,

PETITIONERS, APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and MOORE,*
*Senior Circuit Judge*.

*Dennis J. LaCroix*, Deputy Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

*Michael G. West*, by appointment of the Court, with whom *Kamberg, Berman & Hendel, P.C.* was on brief, for appellee.

December 31, 1974

MCENTEE, *Circuit Judge*. We are required in this case to decide whether it was a denial of due process, where the defendant was a black man accused of violent crimes against a white security officer, for a state court judge to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice.[1]

* Of the Second Circuit sitting by designation.

[1] The defendant's motion for examination of proposed jurors asked that various questions be put to the *voir dire* panel. The question which this litigation involves was "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Commonwealth of Massachusetts appeals from a memorandum and order entered by the district court granting a writ of habeas corpus to appellee, who was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions, *Commonwealth* v. *Ross,* 1972 Mass. Adv. Sh. 873, 282 N.E.2d 70, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Ham* v. *South Carolina,* 409 U.S. 524 (1973). *Ross* v. *Massachusetts,* 410 U.S. 901 (1973). On remand the Supreme Judicial Court held that *Ham* did not affect the result reached in its earlier deliberation, *Commonwealth* v. *Ross,* 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.[2] Ross sought a writ of habeas corpus from the district court, which the court granted, saying:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* [v. *United States,*

[2] After the decision of the Massachusetts Supreme Judicial Court on remand, Ross again filed a petition for certiorari with the United States Supreme Court. The Court denied the petition, *Ross* v. *Massachusetts,* 414 U.S. 1080 (1973), but Justice Marshall filed an opinion, in which Justices Douglas and Brennan joined, dissenting from the denial. This part of the procedural history of this case has no legal effect in this court. The denial of a petition for certiorari from a state court judgment affirming a conviction has no legal significance when an application for a writ of habeas corpus thereafter comes before a district court. *Brown* v. *Allen,* 344 U.S. 443, 488-97 (1953) (opinion of Justice Frankfurter, for a majority of the Court). That only three Justices voted to grant Ross's second petition for certiorari does not mean that five or more Justices were voting, or even would have voted, to affirm on the merits the decision of the Massachusetts Supreme Judicial Court on remand. That the three dissenting Justices filed a lengthy opinion with the denial of certiorari does not reverse the effect to be accorded the denial; the opinion only indicates how strongly those Justices feel about the case. Denial of certiorari may be motivated, among other reasons, by a desire "to have different aspects of an issue further illumined by the lower courts," *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 918 (1950) (opinion of Justice Frankfurter respecting denial of certiorari), or by a preference for administrative reasons to have the prisoner seek habeas corups in the district court. *See generally* R. Stern & E. Gressman, Supreme Court Practice §§ 5.4-5.7 (4th ed. 1969).



283 U.S. 308 (1931),] and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice. In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was excused does not cover the situation, because his perception cannot be imputed to the twelve who were chosen.

> "In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. . . . The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the *voir dire* examination."

In *Ham* v. *South Carolina, supra,* the defendant was a black civil rights leader charged with possession of marijuana. His defense was that the police were out to get him and were framing him on the drug charge. His counsel requested the judge to ask on *voir dire* two questions designed to ferret out any possible racial prejudice against the defendant.[3] The judge did put three general questions to the prospective jurors on the issue of bias, but he refused to ask any question directed specifically to racial prejudice. The Supreme Court, in a unanimous opinion, held "that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." 409 U.S. at 527. The contours of the *Ham* decision were not sharply defined by the Court. Justice Rehnquist's opinion

[3] The two questions sought to be asked were:

> "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
>
> "2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" 409 U.S. at 525 n. 2.

did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so. Nor did the opinion explicitly state that the defense request for specific questions directed to racial prejudice need only be honored where the defendant was a civil rights leader or other "special target of racial prejudice,"[4] which was the construction the Supreme Judicial Court gave *Ham*.[5] *Commonwealth* v. *Ross*, 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.

Under the view we take of the facts in this case, however, we are not required to resolve this ambiguity. In *Ham* the defendant was a civil rights leader, while in this case the black defendant is for the purpose of this inquiry an ordinary black citizen. But in this case, the charges against the

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[4] If a juror were prone to racial bias, we question whether it is reasonable to conclude that he would confine that bias, and its destructive effects on his impartiality, to cases where the defendant was a civil rights leader. That the juror might be particularly prone to vent his bias in such a case in no way supports the conclusion that he would be an impartial juror in the absence of such a special factor, as the due process clause requires, *see Peters* v. *Kiff*, 407 U.S. 493, 501 (1972) (opinion of Justice Marshall).

[5] Other state cases suggest any black criminal defendant, target or not, who requests a specific inquiry about racial prejudice is entitled to it. *Cochran* v. *State*, 505 S.W.2d 520 (Ark. 1974) (prosecution for assaulting an officer during an assemblage or riot); *McNichols* v. *State*, 279 So.2d 377 (Fla. App. 1973) (state confessed error; facts not stated); *Mize* v. *State*, 131 Ga. App. 538, 206 S.E.2d 530 (1974) (black defendant charged with simple battery against white prosecutrix entitled to question on racial prejudice); *Reid* v. *State*, 129 Ga. App. 657, 200 S.E.2d 454 (1973) (error not to allow black woman charged with theft to have questions concerning racial bias); *People* v. *Wray*, 49 Mich. App. 344, 212 N.W.2d 78 (1973) (black defendant charged with carrying concealed weapon in motor vehicle entitled to question all-white jury on racial bias); *Shabazz* v. *State*, 506 S.W.2d 60 (Mo. Ct. App. 1974) (dictum); *People* v. *Rubicco*, 42 App. Div. 2d 719, 345 N.Y.S.2d 624 (2d Dept. 1973), *aff'd on another ground*, 34 N.Y.2d 841, 316 N.E.2d 344, 359 N.Y.S.2d 62 (1974) (possession of gambling records; "reversible constitutional error" to deny motion to ask jurors whether they are biased against Italians); *People* v. *Williams*, 41 App. Div. 2d 611, 340 N.Y.S.2d 504 (1st Dept. 1973) (narcotics convictions reversed because of "direct conflict with . . . *Ham*"). *But see United States* v. *Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990 (1974) (prosecution for uttering forged U. S. treasury check; inquiry about racial prejudice not mandated because no racial overtones shown); *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A.2d 281 (1974) (conviction for forcible rape affirmed by 3 to 2 vote; requested racial question held irrelevant and overbroad).



defendant involved violence against a white, not a victimless crime like possession of marijuana. Moreover, the white victim, a security officer at Boston University, had a status close to that of a police officer. In addition, the eyewitness testimony of a white gas station attendant was a major part of the state's case against Ross. On these facts the district court was not in error in concluding that "[t]he likelihood of infection of the verdict [by racial prejudice] was at least as great as it was in *Ham*." In effect, the court held that a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice.

Our dissenting brother suggests that the rule of *Ham* should only apply to cases brought to trial after the date *Ham* was decided. However, we do not feel the writ should be denied on the ground that *Ham* should not be given retroactive application. The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that court for reconsideration in light of *Ham*. *See Ross* v. *Massachusetts*, 410 U.S. 901 (1973).

It is not a significant distinction between this case and *Ham* that Ham took the stand and put his credibility in issue, while Ross did not take the stand. If a juror is prejudiced against blacks, he would not be able to appraise the defense offered by the black defendant impartially, whether or not that defense included the defendant's taking the stand. Nor is it particularly relevant that the trial court here doubted that questions directed to discovering racial prejudice would result in any admissions of bias. This objection would apply equally well to other questions the court is required to put to proposed jurors. *See* Mass. Gen. Laws Ann. c. 234, § 28 (Supp. 1974). For example, a pro-

posed juror biased by pretrial publicity might aver he is not biased or a juror who believes anyone indicted is guilty as charged might answer that he believes the defendant is innocent until proven guilty, yet we do not allow the possibility of a false answer to serve as an excuse for not asking these questions.

By deciding in this case that the trial judge should have questioned the proposed jurors specifically on the question of racial prejudice, we do not hold that he had to ask the specific questions sought by Ross's counsel. "[T]he trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." *Ham* v. *South Carolina, supra,* at 527. *See Featherston* v. *United States,* 491 F.2d 96 (5th Cir.), *cert. denied,* 94 S.Ct. 3176 (1974). The trial judge has broad discretion as to the questions be asked regarding racial prejudice.[6]

The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied.

*So ordered.*

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[6] We observe with respect to our brother's dissenting opinion that whenever trial judges are vested with broad discretion it is possible to evoke Pandora, but only if one assumes that discretion will be thrown to the winds. As for this and the other points made, we come to rest with the conviction that they would apply equally to the case presented in *Ham*.



MOORE, *Circuit Judge* (Dissenting). The sole issue on this appeal relates to the *voir dire* examination of prospective trial jurors during which the trial judge denied a specific request on behalf of the petitioner, Ross, to ask a particular question, accurately stated by the majority as follows: "Are there any of you who believe that a white person is more likely to tell the truth than a black person?" No question was sought by Ross' counsel addressed to prejudice against Ross as a black. Other questions addressed to prejudice against blacks were requested by co-defendants not involved on this appeal. In my opinion the request of Ross' counsel cannot be given the broad interpretation that the majority has given in saying that it was "a defense request to interrogate prospective jurors specifically on the issue of racial prejudice."

The majority hold, as did the District Court, that the failure of the trial judge to question "the proposed jurors specifically on the question of racial prejudice" amounted to a denial of constitutional due process. In so holding, they rely primarily on the recent Supreme Court decision in *Ham* v. *South Carolina,* 409 U.S. 524 (1973), although they concede that the *Ham* opinion "did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so."

*If* the District Court be correct in saying that "The petitioner had a constitutional right to have the issue of racial prejudice specially called to the attention of the prospective jurors on the *voir dire* examination." and *if* it was a "denial of due process" of constitutional dimension to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice and *if* the District Court had no choice but to enter the order granting the writ of habeas corpus because "The mandate of *Ham* is so

clear . . .", then, in my opinion, Pandora's box of potential evil has indeed been opened wide and I look with Cassandra-like foreboding upon the future of the *voir dire* jury examination in cases involving black defendants.

Starting with the question, which the majority quite accurately states this litigation involves, "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?", I find no relation between such a question and the ultimate desideratum, namely, to uncover racial prejudice against a black defendant. Such a question could not be properly answered unless prosecution and defense read to the prospective juror the name and color of all witnesses they intended to call. Even then it would be impossible to obtain a juror's pre-trial commitment as to a witness' credibility until the particular witness had been seen and heard. Will it be constitutionally impermissive to deny interrogation as to a prospective juror's feelings as to the credibility of a witness of the "X" race, nationality or religion? Illustrative of the problem are questions proposed by petitioners' co-defendants:

> "18. Do you have any feelings either for or against persons of the Black race who wear the Afro style haircut and long sideburns?" (App. p. 56) or
>
> "7. Do you feel that this increase (in crime) is due primarily to blacks in the city?" and
>
> "12. Do you object to the number of blacks and Puerto Ricans on the welfare rolls in the city?" (App. p. 58.)

The other forty questions sought to be asked by these co-defendants were undoubtedly intended in good faith by counsel to ferret out the more intimate prejudices of the panel which was to pass judgment on their clients but query, did not the state trial judge probe sufficiently deeply, as a practical matter, in inquiring "Can you under oath return



a fair and impartial verdict based upon the evidence that you hear in the courtroom and not upon any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (App. p. 494.)

Petitioner argues that the state judge's failure to focus the attention of the prospective jurors as to any racial prejudice they might entertain is "as a matter of constitutional law" reversible error. If this is to be the rule by judicial legislation, in fairness to trial judges, state and federal, the rule should only be so promulgated for future cases.

The District Court concedes that the questions propounded on the general issue of bias and prejudice were exemplary in every respect "except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." However, if there are to be rules they should be clear and capable of objective application. In other words, it is easy to understand and apply a rule which requires a trial judge in every case in which there is a black defendant to inquire of each individual juror whether he would be adversely prejudiced against such a person because of his race. But is the trial judge duty bound to ask such a question in the absence of a request? If he asks the question *sua sponte*, the appeal in all probability will be on the ground that he injected the racial issue into the case — hence reversible error. If he fails to ask the question, the same result will obtain and, if counsel fails to make the request, incompetence of counsel will be the charge on the habeas corpus application.

The importance of appellate pronouncements in the field of trial procedure is because of the guidance they should give to trial judges. What are we telling the trial judge as to how he should conduct the *voir dire* on the next trial so as to avoid constitutional error?

A "next" trial can be assumed. Only a few years have

elapsed since the first trial. The witnesses and their whereabouts in all probability are known. The facts supporting guilt as found on the first trial may be read in the two opinions of the Massachusetts Supreme Judicial Court.[7] But juries, not courts, are to determine guilt or innocence and the method of selection of the jury will be the most important element initially.

Neither *Aldridge*,[8] *Ham, supra*, the District Court opinion nor this court's opinion will be of real value as guidelines. *Aldridge* and *Ham* indicate that questions regarding racial prejudice must be asked. And, although *Ham* and the majority state that the questions need not be "in any particular number" or form, *Ham*, at 527, only an appellate court will be able to decide whether the future trial judge will have properly exercised that "broad discretion" with which appellate courts so liberally endow him.

If the courts are satisfied to accept "No" to the single question "Are you prejudiced against blacks?" and this colloquy is considered to be constitutionally sufficient, such a question should be permitted if counsel should choose to request it. But the courts are not so easily satisfied — and probably properly so. Few jurors will reveal the innermost workings of their minds — particularly in public. The mere "obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]."[9] The courts have said that a prospective juror's eligibility "should not be adjudged on that juror's own assessment of self-righteousness *without something more*."[10]

It is all very well to speak of a standard to be used in

[7] *Commonwealth* v. *Ross*, 282 N.E.2d 70 (1972) and 296 N.E.2d 810 (1973).

[8] *Aldridge* v. *United States*, 283 U.S. 308 (1931).

[9] *United States ex rel Bloeth* v. *Denno*, 313 F.2d 364 at 372 (2nd Cir. 1963), *cert. denied*, 372 U.S. 978.

[10] *Silverthorne* v. *United States*, 400 F.2d 627, 639 (9th Cir. 1968). (Emphasis in original).



the exercise of discretion in passing upon requested inquiries as meeting "the essential demands of fairness." *Aldridge, supra,* at 310 but, what these demands may be, will only be known to the trial judges years later in the opinion of some appellate court.

Take for example a single instance derived from this case because it falls into the category of the "something more" field of inquiry. A proposed question submitted to the trial judge here followed the questions: "Do you have children? Do they go to public schools?" and was:

> "16. If in private schools, is this a result of your feelings towards the number of blacks and Puerto Ricans in the school system?"

In view of certain situations recently reported in the public press existing in Eastern Massachusetts with respect to the public schools such a question might well be included in a probing group, including "Are you at all nervous about walking the streets of your town or city after dark?" Almost unlimited questions along this line can be conjured up for obtaining a true picture of the potential juror's mind. To obtain such a picture the *voir dire* might well more properly be relegated to the psychiatrist.

However, our present concern must be this case. We are given some 120 pages of transcript devoted entirely to the trial judge's efforts to obtain an impartial jury. Successive panels were interrogated. The defendants who are black stood before the prospective jurors. The trial judge was most specific as to "bias or prejudice" generally. The jurors knew when asked about prejudice that the defendants were black. Each juror was given an opportunity to approach the Bench and express whatever his own personal reasons for not wishing to serve. Any possible reluctance to express racial bias or prejudice in public was thus avoided. In fact two jurors were excused because of preju-

dice; one in particular, because of racial prejudice. The ultimate jury consisted of 10 whites and 2 blacks. No incident has been pointed out to us which might indicate that this was not a normal and average American jury which heard the evidence and reached their verdict thereon. If there is to be a new *voir dire* rule, mandating upon request the injection of a racial prejudice issue into the case, I am not prepared to fault the trial judge for not knowing it before it was promulgated.

Finally, I am not unmindful of the fact that a distinguished court (the Massachusetts Supreme Judicial Court) has twice passed upon the issue of fair trial for this defendant. After the first affirmance certiorari was granted and the case remanded for reconsideration in light of *Ham*. That reconsideration was given and again there was affirmance. Certiorari was denied, three Justices vigorously dissenting, as appears in the opinion of Mr. Justice Marshall. 414 U.S. 1080.

The Supreme Court has stated that denial of certiorari has no legal significance — at least as to the merits of the controversy. Nor would I question the sound philosophy behind such an interpretation. Two cases in particular in which the opinions were written by Mr. Justice Frankfurter clearly demonstrate that "such a denial (of certiorari) carries with it no implication whatever regarding the Court's views on the merits of the case which it has declined for review." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950). Again in 1953 the Supreme Court devoted itself in *Brown* v. *Allen*, 344 U.S. 443 (1953), to the effect, if any, which might be attributed to denial of certiorari. In a separate opinion (pp. 488-497) Mr. Justice Frankfurter set forth most specifically the reasons why no effect should be given to denial. The many instances cited of petitions "rarely drawn by lawyers," "almost unintelligible,"



inadequate records, no clear statements of the issues, the lack of importance of the issues, the mere numerical quantity of the petitions, all justify the conclusion that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, . . ."[11] Quite rightly did the Justice say: "The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions." *Brown, supra,* at 497. However, this very expression is pregnant with the possibility as Mr. Justice Jackson pointed out in his separate opinion that "There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the ordinary run-of-the-mill case certainly does not." *Brown, supra,* at 545.

This small opening in an otherwise seemingly impregnable fortress entitles one to peer into the interior — a hypothetical conference chamber in which consideration of certiorari in this case is being discussed. *Ham* for all practical purposes had just been decided. The constitutional issue of the "black" question presented by *Ross* was so clear that a remand was directed in light of *Ham*. When *Ross* next arrived it was in the same garb — no other questions, no procedural issues, no diminution in importance of the only issue — just the same single "black" question. If there were any doubt on the subject Mr. Justice Marshall must have made all conscious of the singleness of the issue in his dissent, Justices Douglas and Brennan joining. Under these circumstances I would be reluctant to characterize this case as an "ordinary run-of-the-mill case." The intervening remand had not created a new issue. If the absence of the "black" question called for remand on the

[11] *United States* v. *Carver*, 260 U.S. 482, 490 (1923).

first petition, its continued absence must have been noted on the second. Very possibly the denial of the *Ross* second certiorari petition has no legal significance but in my opinion the scope and intent of *voir dire* in the specific field of bias and prejudice as presented here has great legal significance. If counsel are permitted to endeavor to obtain via the *voir dire* a juror's commitment as to his views of prospective witnesses' credibility I foresee countless future appeals arising therefrom.

For these reasons — but primarily because I believe that the petitioner received a fair trial in Massachusetts — I dissent and would reverse the granting of the writ.



# United States Court of Appeals for the First Circuit.

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No. 74-1222.

JAMES ROSS, JR.,
PETITIONERS, APPELLEES,

*v.*

THEODORE RISTAINO ET AL.,
RESPONDENTS, APPELLANTS.

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**JUDGMENT**

Entered December 31, 1974

The order of the district court is affirmed with the following directions: That court is directed to issue the writ of habeas corpus unless within 90 days from the date of this judgment the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied. No Costs.

By the Court:

Clerk.

**Appendix B.**

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MASSACHUSETTS**

| | | |
|---|---|---|
| JAMES ROSS, JR., Petitioner, | • | |
| v. | • | CIVIL ACTION No. 74-15-S |
| THEODORE RISTAINO et al., Respondents. | • | |

**MEMORANDUM AND ORDER**

June 24, 1974

SKINNER, D.J.

Petitioner was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. Petitioner is black, and the victim, a security guard at Boston University, is white. At the trial, petitioner's counsel asked the judge to put the following question to the jurors in the course of a *voir dire*:

> "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

Counsel for co-defendants asked for other questions directed to the issue of racial prejudice.

The trial judge declined to ask the requested questions, but did give instructions and ask questions of the jurors which dealt meticulously and extensively with the general issue of bias and prejudice, but did not specifically direct the jurors' attention to the possibility of racial prejudice. The defendant had been identified to the jurors. Two of the jurors asked to be excused because they were prejudiced. One stated explicitly that the prejudice which he entertained was racial. The other's prejudice was not identified. Various other jurors were excused because of preconceived opinions and connections with the police or with Boston University.

On appeal to the Supreme Judicial Court of Massachusetts, the petitioner's convictions were upheld. *Commonwealth* v. *Ross*, 1972 A.S. 873, 282 N.E. 70 (1972). The United States Supreme Court granted certiorari, vacated the judgment and remanded the case for reconsideration in the light of its decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). *Ross* v. *Massachusetts*, 410 U.S. 901 (1973). The Supreme Judicial Court reconsidered the case and again affirmed. *Commonwealth* v. *Ross*, 1973 A.S. 839, 296 N.E. 2d 810. Ross' second petition for certiorari to the United States Supreme Court was denied, with vigorous dissents by Justices Marshall, Douglas and Brennan. *Ross* v. *Massachusetts*, 414 U.S. 1080.

In *Ham* v. *South Carolina*, *supra*, the Court held that Ham, a well-known black activist charged with possession of marijuana, was entitled to have the judge put a question to the prospective jurors specifically directed to the issue of racial prejudice. The Court relied on *Aldridge* v. *United States*, 283 U.S. 308 (1931), in which it was held that such a question was required in a trial in a federal court, as one of the "essential demands of fairness."

On remand, the Supreme Judicial Court treated *Ham* as being limited to situations in which the defendant had become a "special target" of discrimination, relying on the use by Mr.



Mr. Justice Rehnquist of such common judicial locutions as "in this case" and "under the facts shown on this record."

The *Ham* opinion rests on *Aldridge*, however, and the defendant in *Aldridge* was nobody of special notoriety prior to his indictment. The true significance of *Ham* is that it extends the rule of *Aldridge* to trials in state courts.

In *Aldridge*, the black defendant was tried for the murder of a white policeman in the District of Columbia. Defense counsel requested a *voir dire* interrogation of prospective jurors on the issue of racial prejudice, and the court refused to grant it. It was held that the "essential demands of fairness" required that such a question, in some form, be put to prospective jurors, if requested. In the opinion* Chief Justice Hughes quotes the following passage from *People* v. *Reyes*, 5 Cal. 347, 349.

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him."

The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. *They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice.* In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was

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* At 283 U.S. 313.

excused does not cover the situation, because his perception can not be imputed to the twelve who were chosen.

In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. The facts are, indeed, "strikingly similar" to those in *Aldridge*. *Ross* v. *Massachusetts*, 414 U.S. 1080, 1085. ***The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the voir dire examination.***

By reason of long personal experience in the prosecution of criminal cases in state courts, I am acutely aware of the burden on the courts, law enforcement officers and victims imposed when a state court conviction is set aside by a federal court. I am also conscious of the respect which federal courts owe the highest court of the state. The mandate of *Ham* is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order:

The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above.

U.S. District Judge



**Appendix C.**

ADVANCE SHEETS

# OPINIONS OF THE SUPREME JUDICIAL COURT

*Published under authority of Chapter 602 of Acts of 1935*

WRIGHT & POTTER PRINTING COMPANY, 32 DERNE STREET, BOSTON

## COMMONWEALTH *vs.* JAMES ROSS, JR.

Suffolk. April 2, 1973. — May 29, 1973.

Present: TAURO, C.J., REARDON, QUIRICO, KAPLAN, & WILKINS, JJ.

*Practice, Criminal,* Examination of jurors, Fair trial. *Constitutional Law,* Due process of law.

Rehearing by the Supreme Judicial Court pursuant to an order of the Supreme Court of the United States.

TAURO, C.J. This case is here pursuant to an order entered by the United States Supreme Court[1] granting the defendant's petition for certiorari, vacating the judgment affirming his conviction (*Commonwealth* vs. *Ross*, Mass. )[a] and remanding the case to us for further consideration in the light of *Ham* v. *South Carolina*, U. S. .[b] Thus, the only issue we must decide is whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced.

In the *Ham* case, the defendant's conviction for possession of marihuana had been affirmed by the South Carolina Supreme Court. The young black defendant had lived most of his life in Florence County, South Carolina, and was well

[1] Ross vs. Massachusetts, No. 72-5119, U. S. ([January 23, 1973] 41 U. S. L. Week 3103).

[a] Mass. Adv. Sh. (1972) 873.

[b] 93 Supr. Ct. Reporter 848.

known locally for his civil rights activities. He had never previously been convicted of a crime and his basic defence was that the law enforcement officers were "out to get him" because of his civil rights work. The posture of the case thus placed great emphasis on the issue of the credibility of the defendant in light of his reputation as opposed to that of the credibility of the police.

Prior to trial, Ham's counsel requested the judge to ask the prospective jurors four questions, two of which[2] sought to discover any possible racial prejudice. The judge put three general questions to the prospective jurors concerning possible bias, prejudice and partiality, as required by the State statutes,[3] but declined to ask the questions requested by the defendant.

The Supreme Court of the United States reversed Ham's conviction holding that "the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." U. S. at .[c] Although the court's opinion stated that "the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by . . . [the defendant]," the court decided that once the State had "created . . . [a] statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the . . . [the defendant] be permitted to have

[2] These two questions were: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" U. S. , fn. 2 (93 Supr. Ct. Reporter 849, fn. 2).

[3] S. C. Code § 38-202 (1962). The questions were, in substance, the following: "1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham? 2. Are you conscious of any bias or prejudice for or against him? 3. Can you give the State and the defendant a fair and impartial trial?" U. S. , fn. 3 (93 Supr. Ct. Reporter 850, fn. 3).

[c] 93 Supr. Ct. Reporter at 850.





the jurors interrogated on the issue of racial bias." U. S. at .[d]

The defendant Ross was convicted in the Superior Court for armed robbery, assault by means of a dangerous weapon with intent to murder, and assault and battery by means of a dangerous weapon, and was sentenced to prison in the Correctional Institution at Walpole to serve three lengthy concurrent terms.

The judge denied the defendant's request to ask the prospective jurors a specific question designed to elicit possible race prejudice.[4] The three lawyers representing the defendant and the two codefendants who were tried with him[5] were concerned about the veniremen's possible prejudice in

[d] 93 Supr. Ct. Reporter at 850.

[4] The defendant requested the judge to ask the veniremen seven questions. Only one of these questions is presently before us as touching upon racial prejudice: "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" The defendant was tried with two other codefendants named Daniels and Williams, both of whom submitted similar questions which were also rejected by the judge. After Ross's conviction had been affirmed by this court, he filed a petition for writ of certiorari to the United States Supreme Court stating that "each defense counsel submitted motions to the judge which proposed questions to be asked to the jurors concerning the issue of racial prejudice." There was then set forth a list of questions headed by the defendant's question numbered 5, and followed by questions numbered 3, 4, 6-10 submitted by the defendant Daniels and questions numbered 10-19 submitted by the defendant Williams. Ross's brief on rehearing now refers to his own question 5, Daniels's questions 3-16 and Williams's questions 10-19. The Commonwealth properly argues that Ross cannot base assignment of error on the judge's failure to ask the questions submitted by Daniels and Williams because Ross never, by motion or otherwise, adopted those questions as his own. Nevertheless, we think that Ross's own question numbered 5 is sufficient to raise the issue of the judge's failure to ask the veniremen a question (or questions) specifically designed to uncover possible racial prejudice.

In his petition for certiorari to the Supreme Court, Ross insists that the facts in the *Ham* case "exhibit considerable similarity with the case at bar." Actually, the only similarity is that Ham and the defendant Ross are black. The petition for certiorari carefully avoids the additional facts in the *Ham* case (that Ham was well known for his civil rights activities and that he claimed that the police were "out to get him" because of his activities) which are nonexistent in the instant case. Conceivably, the Supreme Court may have considered similar circumstances to have existed in the *Ross* case in view of the allegations in the petition. Ross, in his petition, carefully excluded the judge's comments, remarks and questions addressed to the prospective jurors. For all that appears in the petition, the judge merely put the statutory questions to the jury—and no more.

[5] The defendant Ross was represented by Mr. Newman, the defendant Williams was represented by Mr. Owens and the defendant Daniels was represented by Mr. Donnelly.



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two specific areas: (1) possible race prejudice because the defendants were black and (2) possible lack of impartiality because the victim was a Boston University security guard or "quasi policeman." The judge recognized both these concerns as problems. He agreed to ask the veniremen whether they had ever done police work or whether they had any relatives in such work.[6] It is not argued that such a question failed to protect the defendants from possible bias on this matter, and this aspect of possible lack of impartiality is not before us.

Although the judge declined to ask the veniremen whether they were prejudiced against black people, he decided, "in the interest of good sense," not to mention the defendants' Muslim names appearing on the indictments, but only to refer to them as Ross, Daniels and Williams. The judge carefully weighed the likelihood of discovering bias by means of questions concerning race prejudice and came to the conclusion that it would be most unusual for such questions to reveal any such prejudice.[7] He explained to the veniremen with clarity that they must let the court

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[6] Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?"

[7] The colloquy between the judge and the defence counsel on this matter was as follows:

THE JUDGE: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

"There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

"Is there anything peculiar about it, Mr. Donnelly?"

COUNSEL FOR THE DEFENDANT DANIELS: "No, just the fact that the victim is white, and the defendants are black."

THE JUDGE: "This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during,





know if for any reason they could not try the case impartially, without bias or prejudice or if they had already

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and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

"I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important, but at the same time, my attitude—"

COUNSEL FOR THE DEFENDANT DANIELS: "There is only one thing. The only reference I would make to the facts in this case—the victim being white, and that he was a security guard in uniform and acting as a policeman."

COUNSEL FOR THE DEFENDANT ROSS: "I think that factor might suggest the question—this was my series of questions—asking the jurors whether any of their relatives are policemen."

THE JUDGE: "I will be frank with you; I have done that on the juror-by-juror voir dire in a capital case. I have never done it in anything short of a murder case.

COUNSEL FOR THE DEFENDANT ROSS: "This can be done short of juror-by-juror, just by stating that."

THE JUDGE: "I appreciate that."

COUNSEL FOR THE DEFENDANT WILLIAMS: "In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial—"

THE JUDGE: "Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it."

COUNSEL FOR THE DEFENDANT WILLIAMS: "Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced."

THE JUDGE: "I am astonished at that. It is contrary to all of the experience that I have had."

COUNSEL FOR THE DEFENDANT DANIELS: "I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' They will say they can be. The thrust of these questions is designed to help jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves."

THE JUDGE: "I am going to adopt Mr. Newman's suggestion that we have a double problem here, not only the problem of skin color, but we also have the problem of someone who is a quasi policeman, so I am going to ask a third question, and that is,—and it is a question some of the other Superior Court Judges are allowing in the area of relations to police—'Are you presently or have you in the past worked for a police department or

formed an opinion.[8] He pointed out that "your oath requires . . . that any verdict that you return must be a fair and impartial verdict based upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion or any other experience factor." The veniremen were told that they must raise their hands "[i]f, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict."

It is clear that at least one of the prospective jurors understood that the questions put to him about his prejudice or bias included race prejudice. The defendants were asked to stand up so that the veniremen could see them. The clerk then asked the veniremen the questions outlined by the judge and various other questions previously explained to them but not in dispute here. In answer to the clerk's questions, several prospective jurors raised their hands to indicate possible bias. Those who indicated that they might be biased, prejudiced or had already formed an opinion of the defendants' guilt were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice. Seven prospective jurors were ex-

a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?'

"I know there are one or two judges that have gone much further than that, but most will go no further than that."

[8] General Laws c. 234, § 28, provides: "Examination of jurors. Upon motion of either party, the court shall or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

Apart from the question concerning police affiliations, the veniremen were asked (a) "[i]f any of you are related to the defendants or to the victim, or if any of you have any interest in this case or expressed or formed an opinion or is sensible of any bias or prejudice, please make it known to the Court at this time," and (b) "[i]s there any serious reason why you cannot serve upon this jury, considering that you will be locked up, sequestered, living in a hotel away from your home for about a week?"





cused because they had already formed an opinion, seven were excused because of connections with police work, and one was excused because of his affiliation with the university where the alleged crimes occurred. The final composition of the jury of twelve was ten white persons and two black persons.[9]

Ross asserts that the similarities between his case and the *Ham* case are sufficient to bring him within the rule of that case. We cannot agree. We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias.

Justice Rehnquist, writing for the Supreme Court, was careful to limit the language of the court's opinion to the special circumstances of the case under consideration. The court stated: "[W]e think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice" and more specifically that "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias" (emphasis supplied). U. S. at .[e] In reaching its decision, the Supreme Court relied upon *Aldridge* v. *United States*, 283 U. S. 308, but we believe that the precedent of the *Aldridge* case, which appears to have been given constitutional dimensions, is to be limited to special circumstances as indicated by the *Ham* case.

As we noted previously, Ham was well known for his civil rights work in the locality where he was tried. The very

[9] The Commonwealth had thirty-one unused peremptory challenges left at this point. See G. L. c. 234, § 29, as amended through St. 1963, c. 187.

[e] 93 Supr. Ct. Reporter at 850.

activities that brought him to public attention specifically focused upon the issue of racial prejudice and Ham raised this matter by claiming that the police were "out to get him" because of his activities.[10] To those members of the jury who might have been prone to racial bias, the defendant Ham would have been a prominent target for their prejudice.

In the instant case, however, there was nothing that pointed to Ross as a special target for racial prejudice. The trial judge addressed the attorneys for the defendants and the Commonwealth in the lobby of the court room and stated that he "thought from something Mr. Donnelly [representing Daniels] said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court." He then asked, "Is there anything peculiar about it. Mr. Donnelly?" to which Mr. Donnelly replied, "No, just the fact that the victim is white, and the defendants are black." The attorney for Ross, who was present at the lobby conference, did not bring any other special circumstances to the judge's attention and we assume that there were none.

We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the States to insure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions designed to discover racial prejudice of the veniremen did not, in this case, violate the defendant's right to the demands of fairness. Contrary to the judge in the *Ham* case,

[10] As we have previously noted, this was Ham's principal defence and thus his credibility as opposed to that of the police was crucial. This issue was not explicitly raised in the instant case. Actually, Ross did not take the stand in his own defence and therefore his credibility was not before the jury.





the judge in the instant case expressly recognized the relevance and importance of the problem. He was meticulously careful in questioning the veniremen upon their bias and prejudice and took great pains to insure that veniremen who expressed doubts about their ability to be impartial were excluded from the jury. We believe that the judge's questions and comments to the veniremen were, in these circumstances, commensurate with the requirements of the Fourteenth Amendment.

Although we hold that the judge's examination of the prospective jurors meets the essential demands of fairness in this case, we perceive that it will be unusual for a trial judge to understand fully the dimensions of a case before he has heard it. The issue of racial prejudice may not be apparent at the outset of a case but may become evident during the trial. Therefore, when a defendant requests that the prospective jurors be questioned about their racial prejudice, the judge should make specific inquiries of counsel concerning the racial aspects of the case. Such an inquiry was properly made in the instant case.[11] If it appears from such preliminary inquiries that the case might reasonably be expected to present factors involving possible racial prejudice, then the judge should question the prospective jurors in this area. In such circumstances, it is within the trial judge's discretion to determine the precise format of the questions to be asked, provided the inquiry is "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain." U. S. at .[f]

*Judgments affirmed.*

*Michael G. West* for the defendant.

*Gerald F. Muldoon,* Assistant District Attorney *(James M. McDonough,* Legal Assistant to the District Attorney, with him), for the Commonwealth.

*Robert H. Quinn,* Attorney General, *& Jeremiah O'Sullivan,* Assistant Attorney General, amici curiae, submitted a brief.

[11] See fn. 7, *supra.*

[f] 93 Supr. Ct. Reporter at 851.

Appendix D.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

*Published under authority of Chapter 402 of Acts of 1935*

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# COMMONWEALTH *vs.* JAMES ROSS, JR. (and eight companion cases[1]).

Suffolk. December 6, 1971. — April 27, 1972.

Present: TAURO, C.J., CUTTER, REARDON, QUIRICO, & BRAUCHER, JJ.

*Identification. Practice, Criminal,* Assistance of counsel, Examination of jurors. *Constitutional Law,* Assistance of counsel, Self incrimination. *Evidence,* Inculpatory communication, Relevancy and materiality. *Search and Seizure. Probable Cause. Jury and Jurors.*

Indictments tried in the Superior Court before *Hennessey*, J.

TAURO, C.J. The defendants Ross, Daniels, and Williams appeal under G. L. c. 278, §§ 33A–33G, from convictions on nine indictments arising out of an armed robbery of Timothy Lehane, a security guard at Boston University. Each defendant was charged with armed robbery, assault with a dangerous weapon, and assault and battery with intent to murder. The principal assignments of error argued on appeal relate to the trial judge's refusal to suppress the in-court identification of the defendant Daniels by the victim Lehane and the in-court identifications of all three defendants by a witness, Howard Lembeck. In addition, the defendant Ross argues that the judge erred in admitting evidence of an inculpatory gesture by him, in admitting certain paper money in possession of the defendant Daniels, and in denying his request that the judge ask certain ques-

[1] Of the companion cases two are against James Ross, Jr., three are against Roy Daniels, Jr., and three are against James Williams.



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tions of proposed jurors to determine possible racial prejudice.

From the evidence presented at voir dire and at trial, the following appears: On March 6, 1970, at 4 A.M. a black 1960 Oldsmobile containing three black males pulled up beside the pumps at Silva's Texaco Station, 601 Commonwealth Avenue, Boston. Howard Lembeck, the attendant on duty, conversed with the men, who remained inside the automobile. He sold one of them an inflated plastic rabbit. At one point, he leaned inside the car and passed out cigarettes to each of the men and, at another point, the men asked whether the Boston University radio tower was open, and Lembeck replied, "I don't know." Apart from two brief visits to the station office, Lembeck stood next to the Oldsmobile beside the rear window on the passenger's side. Allegedly, the defendant Ross was seated in front on the driver's side, the defendant Williams in front on the passenger's side, and the defendant Daniels in back on the passenger's side. The area in which the vehicle was parked was illuminated by floodlights.

After fifteen or twenty minutes, Lehane drove into the pump area of the filling station in an unmarked Boston University security automobile. The man identified as Daniels questioned Lembeck about Lehane, and Lembeck told him that Lehane was a security guard at Boston University. This man then got out of the Oldsmobile and, carrying the plastic rabbit, approached Lehane who, in the meantime, had gotten out of his vehicle. In plain view of Lembeck, the man and Lehane conversed for approximately two minutes in which time the man offered to sell Lehane the plastic rabbit. He also asked whether "Eddie" was over at the School of Public Communications and Lehane answered that he would go over and find out. Following the conversation, Lehane left the filling station and drove up Commonwealth Avenue to the School of Public Communications. The man identified as Daniels and his two companions followed in the Oldsmobile and parked two car lengths in front of Lehane's car on Hinsdale Street. A brutal and unprovoked attack ensued in which Lehane





received serious, multiple stab wounds. The man identified as Daniels was the first to attack but the other men later joined in. At one point an assailant said, "Get his gun," and then the victim felt a hand reach into his pocket and take his wallet. The three men then left Lehane bleeding, on the ground. Back at the filling station, five or ten minutes after Lehane and the three men had left, the attendant Lembeck observed the black 1960 Oldsmobile coming down Commonwealth Avenue at a high rate of speed with three black male occupants.

Later the same morning at approximately 6 A.M., two Boston police officers in a patrol car observed a black Oldsmobile turn from Dartmouth Street onto Tremont Street, through a flashing red light, at about fifty miles an hour. The officer driving the patrol car was aware of the assault at Boston University about an hour earlier. After a pursuit on Tremont Street, the police officers stopped the Oldsmobile and took the occupants, four black men, into custody. There was a large pink bunny with visible red stains on the rear deck. At this time a cursory search was made of the men. Later at station 4, while making an inventory of the defendants' possessions, one of the arresting officers removed a wallet, folded in thirds, from the defendant Daniels's outer coat pocket. He slid the wallet across a sloping desk to the booking officer, the fold opened, and out fell a five dollar bill and two ones. Upon observing bloodstains on two of the bills, the police segregated all three bills from the wallet and kept them for further investigation.

Still later in the morning, two police officers interviewed Lembeck at the filling station. Lembeck then went with the officers to the police station, where he made a written statement, and then to the Roxbury District Court, where he observed the defendants Ross and Daniels and a third man in the "lockup" area and later at the arraignment. On voir dire, Lembeck testified that, without any direction from police, he scrutinized about a dozen men in the "lockup" area, and that privately in his own mind he picked out Ross and Daniels. At trial, he was permitted to testify that the defendant Ross gestured to him from

within the wire enclosure by raising a finger to his lips suggesting silence. Also on voir dire, he testified that he identified Ross and Daniels for the police after watching the arraignment but that he did not identify the third man arraigned with them. The defendant Williams, the fourth man in the car, was not present at the arraignment.

About a week later, Lembeck identified the defendant Williams after viewing a group of fourteen police photographs of black males the same age as the defendants. These included pictures of Ross, Daniels, and the third man at the arraignment. Lembeck knew at this time that the police held a fourth suspect who had not been present in the District Court. Lembeck first viewed the pictures at the filling station and made his identification of Williams on the second run through the photographs. He also identified Ross and Daniels. He was then taken to the police station where he again looked at the photographs and identified Williams. Approximately three months later, there was a third showing of the photographs, this time at the district attorney's office. On the same day, Lehane also visited the district attorney's office and viewed the photographs separately. He identified only the defendant Daniels.

After the voir dire hearing the judge below denied the motions of all the defendants with respect to in-court identification testimony but did allow the defendants' motions in so far as they might be "construed as motions to suppress the Commonwealth's offering of the photographic identification procedures by the witnesses Lembeck and Lehane, and the Roxbury courthouse identification procedures by the witness Lembeck." Later at trial, however, the judge limited his last ruling to the extent that he allowed Lembeck to give testimony concerning the attempt by the defendant Ross to communicate with Lembeck by gesture at the Roxbury District Court.

1. Each defendant contends that the judge erred in permitting Lembeck to identify him at trial. The defendants Ross and Daniels maintain, principally in reliance upon *United States* v. *Wade*, 388 U. S. 218, *Gilbert* v. *California*,





388 U. S. 263, and *Stovall* v. *Denno*, 388 U. S. 293, that Lembeck's in-court identifications were the fruit of impermissibly suggestive pre-trial lineups, conducted in the absence of counsel, in violation of the right of the defendants to counsel, and to a fair trial. In addition, the defendant Ross contends on the basis of *Simmons* v. *United States*, 390 U. S. 377, as does the defendant Williams, that Lembeck's in-court identifications were tainted by prior photographic identification procedures.

The judge after making detailed subsidiary findings on all the issues of identification concluded as follows: "The circumstances surrounding the identification procedures by Mr. Lembeck at the Roxbury courthouse have not been shown in enough detail before me to demonstrate an illegality in those procedures. Nor has any illegality been demonstrated re the photograph[ic] identifications made by the witness . . . Lembeck . . . . However, even assuming the illegality of these procedures, I find that . . . the in-court identifications of all three defendants by the witness Lembeck are independent of the in-custody procedures and are therefore valid."

The judge ruled that the Commonwealth had satisfied its burden of proving the independence of the in-court identifications by "clear and convincing evidence" as *United States* v. *Wade*, *supra*, at 224, requires. There was an ample evidentiary basis to support the judge's conclusion.

We deal first with the pre-trial identifications of Ross and Daniels. While there may have been an element of suggestiveness in Lembeck's confrontations with the defendants at the Roxbury court house, we believe that the judge correctly emphasized Lembeck's prior opportunity to observe the men at the filling station earlier the same morning. The pump area of the filling station was well lighted, and Lembeck could see the features of the three occupants clearly. Although he talked mainly with Daniels, he had some conversation with all three men, he was in their presence for approximately twenty minutes, and he leaned inside the automobile at one point and gave each man a cigarette. Later, he saw Daniels outside the automobile

as he conversed with Lehane. The atmosphere during Lembeck's prolonged encounter with the trio was not casual, but gave Lembeck reason to feel uneasy and thus to be more conscious and aware of the men. The defendants argue that Lembeck did not describe the men in detail in either his oral or his written statement to the police; however, it is undisputed that the police did not ask for details and, in this circumstance, we attach no particular significance to the lack of a detailed description in Lembeck's statements.

In cases where there has been a suggestive in-custody identification, the determination whether to permit an identification at trial requires a consideration of a variety of factors. *United States* v. *Wade*, *supra*, at 241.[2] See *Gilbert* v. *California*, 388 U. S. 263, 272–274; *Commonwealth* v. *Cooper*, 356 Mass. 74, 84; *Commonwealth* v. *Wilson*, Mass. , ;[a] *Commonwealth* v. *Mendes*, Mass. , .[b] The factors applied, however, depend upon their context, and every factor is not necessarily entitled to equal weight. See *United States* v. *Wade*, 388 U. S. 218, 241–242, n. 33; *Stovall* v. *Denno*, 388 U. S. 293, 302. If greater weight is given to any single factor, "[t]he extent of the witness' opportunity to observe the defendant at the time of the crime . . . seems the most important. Clearly the firmer the contemporaneous impression, the less is the witness subject to be influenced by subsequent events." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.). *Commonwealth* v. *Mendes*, *supra*.[b] In the circumstances of the instant case, we are satisfied that Lembeck had ample opportunity to observe all three men at the filling station and that, as a result of his observations, he received a firm contemporaneous impression of each of them. We have considered the evidence bearing upon Lembeck's confronta-

[2] The six factors enumerated in *United States* v. *Wade*, 388 U. S. 218, 241, were: "(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying another person or (4) in failing to identify the defendant; (5) the receipt of other suggestions, and (6) the lapse of time between the crime and the identification." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.).

[a] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[b] Mass. Adv. Sh. (1972) 681, 684.





tions with Ross and Daniels at the Roxbury court house, and we conclude the judge correctly ruled that these confrontations were not so suggestive as to taint Lembeck's initial impression of the men. *Cooper* v. *Picard*, 428 F. 2d 1351, 1354 (1st Cir.), *S. C.* 316 F. Supp. 856, 859 (D. Mass.). See *Commonwealth* v. *McGrath*, Mass. , – .[c] Compare *Foster* v. *California*, 394 U. S. 440, 442–443. For these reasons, we conclude there was sufficient basis for the judge's determination that the in-court identifications of Ross and Daniels had an origin independent of Lembeck's pre-trial confrontations with the defendants at the court house. See *Commonwealth* v. *Robinson*, 355 Mass. 620, 621–622; *Commonwealth* v. *Cooper*, *supra*, at 84–85; *Commonwealth* v. *Cefalo*, 357 Mass. 255, 257–258;[d] *Commonwealth* v. *Balukonis*, 357 Mass. 721, 725;[e] *Commonwealth* v. *Wilson*, Mass. , – ;[f] *Commonwealth* v. *Tempesta*, Mass. , .[g] Compare *Commonwealth* v. *Kazonis*, 356 Mass. 649, 653.

We turn next to the claims of the defendants Ross and Williams concerning photographic identification procedures followed by the police. Both defendants point to the judge's finding that, of the photographs shown to Lembeck, "[o]nly the pictures of the three defendants . . . contained on the reverse side the names and other information concerning the subjects of the photographs." However, there was no finding, nor was there any evidence on which a finding could be based, that the witness saw the written material, much less was influenced by it. Furthermore, apart from this writing, the photographs were all of the same type and each showed a black male of approximately the same age as the defendants.

The defendant Williams also objects to the manner in which the photographs were shown. He notes that, when

[c] Mass. Adv. Sh. (1972) 591, 596–597.

[d] Mass. Adv. Sh. (1970) 507, 509.

[e] Mass. Adv. Sh. (1970) 1043, 1046–1047.

[f] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[g] Mass. Adv. Sh. (1972) 335, 338–339.



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Lembeck viewed the photographs at the police station, an officer pointed to the picture of Williams and inquired about him by name, and that the witness then made a positive identification. While we might attach more significance to this episode if it had been Lembeck's first identification of Williams (see *United States* v. *Trivette*, 284 F. Supp. 720, 723 [D. D. C.]), we see little, if any, significance in the episode since the witness had already identified Williams on a prior showing, an hour earlier at the filling station, without any suggestion whatever from the police.

We agree with the judge that police procedures in connection with the photographic identifications were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. *Commonwealth* v. *Wilson*, 357 Mass. 49, 54.[h] In any event, even if we were to assume that they were, we are satisfied that Lembeck's prior observations of Ross and Williams on the morning of the crime were "an independent source" for his in-court identifications. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[i] *Commonwealth* v. *McGrath*, Mass. , .[j]

We recognize that the objections of the defendant Williams to some extent relate to the absence of counsel at the various showings of photographs to Lembeck. As we understand the *Simmons* decision, however, it was expressly limited to due process considerations. No claim was made under the Sixth Amendment. *Simmons* v. *United States*, 390 U. S. 377, 383. The case of *Cox* v. *State*, 219 So. 2d 762 (Ct. App. Fla.), to which Williams directs our attention, involved a video taped lineup and is plainly distinguishable from the instant case on the facts. Nor do we believe that the showing of standard police identification photographs constitutes a State compelled "confrontation" or exhibition within *United States* v. *Wade*, 388 U. S. 218, 228. Cf. *Commonwealth* v. *Geraway*, 355 Mass. 433, 438–439. In this regard, we agree with the following statement from *United States* v. *Bennett*, 409 F. 2d 888, 899–900 (2d Cir.), cert. den. sub nom. *Haywood* v. *United States*, 396 U. S. 852, reh. den. 396 U. S. 949: "[T]o require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant . . . is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analyses of the assistance to be given by counsel . . . [citations omitted] suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when . . the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proferred. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses. . . . [I]n [the] *Wade* [case] itself, the Court listed as one of the ways the prosecution might attempt to show that a witness' identification of defendant at trial was not the fruit of a lineup held in the absence of counsel a showing of 'the identification by picture of the defendant prior to the lineup,' 388 U. S. [218] at 241 . . ., which clearly implies that such identifications are permissible even when defendant's counsel is not present."[3] See *United States* v.

[h] Mass. Adv. Sh. (1970) 235, 239.

[i] Mass. Adv. Sh. (1970) 235, 239.

[j] Mass. Adv. Sh. (1972) 591, 597.

[3] The majority of circuits of the United States Court of Appeals follow the approach of the Second Circuit in the *Bennett* case. See *United States* v. *Collins*, 416 F. 2d 696, 699–700 (4th Cir.), cert. den. sub nom. *Collins* v. *United States*, 396 U. S. 1025; *United States* v. *Ballard*, 423 F. 2d 127, 130–131 (5th Cir.); *United States* v. *Serio*, 440 F. 2d 827, 829–830 (6th Cir.), cert. den. sub nom. *Serio* v. *United States*, 404 U. S. 838; *United States* v. *Robinson*, 406 F. 2d 64, 67 (7th Cir.), cert. den. sub nom. *Robinson* v. *United States*, 395 U. S. 926; *United States* v. *Long*, 449 F. 2d 288, 301–302 (8th Cir.); *Allen* v. *Rhay*, 431 F. 2d 1160, 1166–1167 (9th Cir.), cert. den. 404 U. S. 834; *United States* v. *Edwards*, 433 F. 2d 357, 358 (9th Cir.); *United States* v. *Roustio*, 435 F. 2d 923, 924 (9th Cir.); *United States* v. *Williams*, 436 F. 2d 1166, 1169 (9th Cir.), cert. den. sub nom. *Williams* v. *United States*, 402 U. S. 912; *United States* v. *Fowler*, 439 F. 2d 133, 134 (9th Cir.); *McGee* v. *United States*, 402 F. 2d 434, 436 (10th Cir.), cert. den. 394 U. S. 908; *Reck* v. *United States*, 410 F. 2d 1131, 1132 (10th Cir.), cert. den. 396 U. S. 970; *United States* v. *Von Roeder*, 435 F. 2d 1004, 1010 (10th Cir.). But see *United States* v. *Zeiler*, 427 F. 2d 1305, 1307 (3d Cir.); *United States* v. *Ash*, F. 2d , (D. C. Cir.) (en banc, 5–4) (10 Cr. L. Rep. 2408). Decisions in ten States

*Roth*, 430 F. 2d 1137, 1140 (2d Cir.) (following the *Bennett* decision), cert. den. sub nom. *Roth* v. *United States*, 400 U. S. 1021.

2. Nor is there merit in the defendant Daniels's argument that the judge erred in permitting the victim Lehane to identify him at trial. He raises objections to police photographic identification procedures under *Simmons* v. *United States*, 390 U. S. 377, which are similar in nature to those of the defendant Williams just considered. Lehane spoke with the man he identified as Daniels, face to face at a distance of two feet, for two to three minutes in a well lighted area of the filling station. The conversation (first about the inflated plastic rabbit and later about "Eddie" at the School of Public Communications) was such to arouse Lehane's suspicions and to cause him to scrutinize the man's appearance. This man was Lehane's principal assailant. About three months later at the district attorney's office, Lehane viewed the same set of photographs as the witness Lembeck had seen earlier. There was, as we have stated, nothing suggestive about these photographs apart from some writing on the reverse side of four pictures in the set.[4] At voir dire, Lehane testified that he viewed the photographs face up, and only after picking out Daniels, did he notice the writing on the back of some of the pictures. No police were present during the viewing, and although Lehane knew the set contained pictures of all his assailants, he declined to identify any but the photographs of Daniels. Had the writings influenced him, a different result might ensue. While it is true he had seen a newspaper photograph showing

accord with the *Bennett* case. *People* v. *Lawrence*, 4 Cal. 3d 273. *Reed* v. *State*, 281 Atl. 2d 142, 145–146 (Del.). *Staten* v. *State*, 248 So. 2d 697 (Ct. App. Fla.). *People* v. *Martin*, 47 Ill. 2d 331, 336, cert. den. sub nom. *Martin* v. *Illinois*, 403 U. S. 921. *Smith & Samuels* v. *State*, 6 Md. App. 59, 64. *Crenshaw* v. *State*, 13 Md. App. 361, 365–370. *Stevenson* v. *State*, 244 So. 2d 30, 33 (Miss.). *State* v. *Brookins*, 468 S. W. 2d 42, 47 (Mo.). *State* v. *Accor*, 277 N. C. 65, 80–81. *State* v. *Searcy*, 4 Wash. App. 860, 861–864. *Kain* v. *State*, 48 Wis. 2d 212, 218–219. Decisions in two States are contra. *Thompson* v. *State*, 85 Nev. 134, 137–138. *Commonwealth* v. *Whiting*, 439 Pa. 205, 209, cert. den. sub nom. *Pennsylvania* v. *Whiting*, 400 U. S. 919.

[4] The photographs of the fourth man arrested with the defendants on the morning of the crime, as well as those of the defendants, bore the name of the subject and other data on its reverse side.





Daniels and the man arraigned with both Ross and Daniels, significantly he picked out only Daniels's picture among those he viewed at the district attorney's office.

In these circumstances, the judge was correct in concluding that there was nothing in the photographic identification procedures sufficient "to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. Further, regardless of any possible suggestiveness in the photographic viewing,[5] we conclude that the observations of Lehane on the morning of the crime fixed in his mind the features of his principal assailant and provided at trial "an independent source" for his identification of Daniels. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[6] *Commonwealth* v. *McGrath*, Mass. , .[7]

3. We come next to the argument by the defendant Ross that there was error in the admission of testimony by Lembeck that he observed the defendant make an inculpatory gesture while at the Roxbury court house. Ross contends that the evidence of the inculpatory gesture was the direct result of an illegal pre-trial confrontation and was therefore inadmissible under *Gilbert* v. *California*, 388 U. S. 263, 272–273. We do not agree.

It is undisputed that police officers brought Lembeck to the court room at the Roxbury District Court between nine and ten o'clock on the morning of the crime. There were approximately twelve black males, including the defendants Ross and Daniels, in a wire enclosure visible from the court room. Lembeck testified that, without encouragement from police, he "looked around on . . . [his] own," and that when no police were present, the defendant Ross placed the forefinger of his right hand vertically to his lips while at the same time making a "peace sign" (first and second

[5] To the extent, however, that the defendant Daniels relies on the Sixth Amendment, we reject his claim without qualification. For the reasons stated, *supra*, we are of the opinion that the right to have counsel present does not extend to showings of standard police identification photographs.

[6] Mass. Adv. Sh. (1970) 235, 239.

[7] Mass. Adv. Sh. (1972) 591, 597.

fingers forming a "V") with his left hand. According to Lembeck, the police at no time pointed to, nor did they ask him to identify, any of the men in the enclosure. He picked out the defendants Ross and Daniels in his own mind, but he did not tell the police until later.

The right to have counsel present attaches at every "critical stage" of a criminal case where the State exhibits the defendant to the victim of the crime or to potential witnesses against him. *Commonwealth* v. *Cooper*, 356 Mass. 74, 80–83. *Commonwealth* v. *Guillory*, 356 Mass. 591, 592–593. *Commonwealth* v. *Wilson*, 357 Mass. 49, 55–56.[m] See *United States* v. *Wade*, 388 U. S. 218, 236–237; *Gilbert* v. *California*, *supra*, at 272. See also *Simmons* v. *United States*, 390 U. S. 377, 382–383; *Foster* v. *California*, 394 U. S. 440, 442; *Coleman* v. *Alabama*, 399 U. S. 1, 7. The defendant Ross makes much of the fact that the police brought the witness to the court room in order to view the arraignments and, if possible, to identify the suspects. However, even if we agreed that this factor sufficiently indicates a State compelled confrontation, we perceive no constitutional error in the admission of Lembeck's testimony concerning the defendant's gesture to him. While pre-indictment lineup may be a "critical stage" within the meaning of the *Wade* case (see *Commonwealth* v. *Cooper*, *supra*; *Mason* v. *United States*, 414 F. 2d 1176, 1178–1181 [D. C. Cir.]), we do not believe that lack of counsel is determinative in the present circumstances. The purpose of the *Wade* case, as the defendant Ross himself states, is to provide the accused, through the presence of counsel, with an adequate basis at trial to recount any unfairness in pre-trial police identification procedures and to enable an informed cross-examination of identification witnesses. *United States* v. *Wade*, *supra*, at 232. It is difficult, however, to see the relevance of this protection in the present situation where, prior to arraignment, the defendant Ross signalled the witness from the detention pen. The gesture was a voluntary act and in no sense the result of police exploitation. Thus,

[m] Mass. Adv. Sh. (1970) 235, 239–240.





even assuming arguendo the illegality of the witness's observation of the lockup, we are nonetheless satisfied that evidence of the inculpatory gesture came "by means sufficiently distinguishable to be purged of the primary taint" of the lockup identification. *Wong Sun* v. *United States*, 371 U. S. 471, 488. See *Gilbert* v. *California*, *supra*, at 272–273.

Furthermore, we believe the Supreme Court never intended that the *Wade* decision should protect a criminal defendant from an inculpatory communication, whether by word or by gesture, if the communication is voluntary. The prohibition against pre-trial identification without notice and without counsel depends on the Sixth Amendment and not on the Fifth Amendment. In *United States* v. *Wade*, *supra*, at 222, the court said: "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." See *Commonwealth* v. *Cooper*, 356 Mass. 74, 82. If the defendant's gesture created a "critical" situation for him, responsibility rests with the defendant and not with the Commonwealth. In the absence of this voluntary gesture on the defendant's part, it is clear that the judge would have suppressed Lembeck's identification of the defendant in the detention area, in its entirety, just as he suppressed the later identification at his arraignment. In the circumstances, the defendant cannot now complain that his own voluntary conduct deprived him of his constitutional rights. Nothing was done or said to the defendant which compelled his act of self-incrimination. In any event, even if the defendant's lawyer had been present in the court room, we fail to see what protection his mere presence would have afforded the defendant. "No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U. S. 757, 766. This is the logical rationale unless we require that counsel must be with a defendant at all times

and places (including the "dock") so that he may advise him not to incriminate himself by gesture to those who may be witnesses against him. We do not believe the Fifth Amendment protection against self-incrimination can be carried to such an extreme. See *Miranda* v. *Arizona*, 384 U. S. 436, 474.

4. The defendant Ross contends that the judge erred in admitting in evidence against all the defendants certain paper money, covered with bloodstains, which the police took from the defendant Daniels while making an inventory of his possessions at the police station. Ross argues that admission of the money was error because it was the fruit of an illegal search and seizure and, also, because it was alternatively irrelevant or prejudicial in the circumstances of this case.

We consider the defendant's nonconstitutional ground first. "The relevancy of . . . [evidence] depends upon the question, whether it has a rational tendency to prove the issues made by the pleadings or other incidental material issues developed in the course of the trial." *Commonwealth* v. *Durkin*, 257 Mass. 426, 427–428. The fact that there was no testimony as to the type of the blood on the paper money goes to the weight and not to the admissibility of the evidence. The victim Lehane testified that the defendant Daniels and two other black men had stabbed and robbed him, that he had bled profusely, and that a five dollar bill was among the property taken from him. Also, there was testimony that the paper money was found not within the compartment of the defendant Daniels's wallet but rather inserted loosely inside the fold. Further, the testimony of the witness Lembeck placed the defendants Ross and Williams as well as the defendant Daniels at the scene of the crime. We conclude, therefore, that the paper money had probative value because, together with other evidence, it tended to establish the fact of robbery and to constitute a link between all three defendants and the crime. See *Commonwealth* v. *Abbott*, 130 Mass. 472, 473; *Commonwealth* v. *Durkin*, *supra*, at 428; *Commonwealth* v. *Norton*, 339 Mass. 592, 594; *Commonwealth* v. *Palladino*, 346 Mass.





720, 726; *Commonwealth* v. *White*, 353 Mass. 409, 419. There is no merit to the contention by the defendant Ross that the blood tainted paper money was so inflammatory as to be inadmissible. See *Commonwealth* v. *Stirling*, 351 Mass. 68, 71–72.

Inasmuch as the Commonwealth does not contest Ross's standing, we proceed to the merits of his claim of constitutional error with reference to the paper money. In denying his motion to suppress made under *Mapp* v. *Ohio*, 367 U. S. 643, the judge ruled as follows: "[t]he procedure which gave rise to the seizure . . . [of the paper money] was not a search within the Constitutional prohibitions raised by this motion, but instead was a mere inventory of the suspect's effects within the unvarying police procedures, for the purpose of protecting the valuables of the suspects and removing from them any property which could be instruments for suicide or self-injury by prisoners."[6] The judge made subsidiary findings, fully supported by the evidence, which may be summarized as follows: After arresting the defendants Ross, Daniels, and Williams and a fourth man, the police took the suspects to the police station for booking. There, as a part of normal booking procedures, an inventory was made of their possessions. The paper money later sought to be suppressed became visible simultaneously to two officers when one officer slid Daniels's wallet across a sloping booking desk to the other officer and the fold in the wallet opened and three loose bills emerged from the fold. The officers seized the bills when they observed what appeared to be bloodstains on two of them. At this time, they were aware that there had been an armed robbery, although they did not know the amount of money allegedly taken from the victim. There was no error.

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[6] The judge also made a second ruling that "even if the procedure at the police station were construed to be a search within the Constitutional prohibitions raised by the motion, the events at the police station constituted a reasonable and lawful continuation of the hasty and permissible search of the suspects which was conducted at the time and place of the arrests and which was temporarily suspended for good and necessary reasons of security, and was then continued at the police station after a lapse of only about seven minutes." In view of our holding, *post*, we find it unnecessary to review this second ruling.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465. These circumstances include a requirement that discovery of the evidence be inadvertent and incident to legitimate police activity. *Id.* at 465–471. See *Commonwealth* v. *Haefeli*, Mass. , – ;[8] *Harris* v. *United States*, 390 U. S. 234, 236. There must, in addition, be "a nexus . . . between the item to be seized and criminal behavior." *Warden* v. *Hayden*, 387 U. S. 294, 307. In the instant case, as the defendant Ross concedes, there is no question that the pre-incarceration inventory of possessions was a legitimate police function. On the evidence, an ultimate finding was warranted that the paper money seized came into plain view through inadvertence and during routine, legitimate police work. See *Westover* v. *United States*, 394 F. 2d 164 (9th Cir.). Compare *Brett* v. *United States*, 412 F. 2d 401, 405–406 (5th Cir.); *United States* v. *Jones*, 317 F. Supp. 856, 858 (E. D. Tenn.).[7] Finally, the bloodstains on two of the bills, and the suspicious location of these bills outside the compartment of the wallet, provided sufficient nexus between the paper money and the armed robbery to provide probable cause for the seizure. See *Commonwealth* v. *Haefeli*, *supra*, at – .[8] For these reasons, we cannot say that it was improper in the circumstances of this case for the police to seize the paper money without first obtaining a search warrant.

5. The defendant Ross asserts that the judge's failure to ask the veniremen specific questions drawn by the defendant on the subject of racial prejudice deprived him of the right to an impartial jury. We said in *Commonwealth* v. *Nassar*,

[8] Mass. Adv. Sh. (1972) 423, 432–433.

[7] Furthermore, there was no evidence here, as there was in the *Jones* case (at 857), that police went through the compartments of the suspect's wallet. Even if this had been the case, however, it would have been open for the Commonwealth to show that it was necessary to count the money in the suspect's wallet in order to give the suspect an accurate receipt and thereby to ensure the safety of his valuables. This justification was apparently not considered in the *Jones* case. See p. 858.

[8] Mass. Adv. Sh. (1972) at 433–434.





354 Mass. 249, 253–254; "In accordance . . . with our long standing practice, inquiry of prospective jurors was only by the judge. A trial judge is required only to ask those questions prescribed by statute or court decision. Other questions are in his discretion. . . . [citations omitted] There is ample power in this court to review whether a trial judge has committed any abuse of discretion in refusing to put additional questions, or otherwise to test members of the venire for bias or interest." Upon his probing the subjects required by law (see G. L. c. 234, § 28), he was satisfied that the jurors could render a fair and impartial verdict. There was no abuse of discretion, let alone any constitutional error.

*Judgments affirmed.*

*Mary C. Kingsley* (*Reuben Goodman* with her) for Roy Daniels, Jr., & another.

*Michael G. West* for James Ross, Jr.

*Gerald F. Muldoon*, Assistant District Attorney, for the Commonwealth.

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